

ORIGINAL

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-1001

RECEIVED  
OCT 14 4 43 PM '98

Revisions to Library Reference Rule )

Docket No. RM98-2

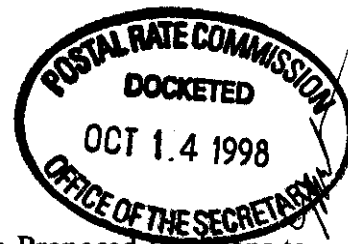
COMMENTS OF  
DISTRICT PHOTO INC., YORK PHOTO INC., MYSTIC COLOR LAB,  
SEATTLE FILMWORKS, INC. AND SKRUDLAND PHOTO INC.  
IN RESPONSE TO COMMISSION ORDER NO. 1219  
CONCERNING PROPOSED REVISIONS  
TO COMMISSION RULES ON LIBRARY REFERENCES  
(October 14, 1998)

Introduction

In response to Commission Order No. 1219 (issued August 27, 1998), District Photo Inc., York Photo Inc., Mystic Color Lab, Seattle Filmworks, Inc., and Skrudland Photo Inc. (hereinafter "DYMSS") hereby submit their joint comments on the Commission's proposed revisions to its rules of practice governing library references.

Background

As observed in the Commission's Notice and Order on Proposed Revisions to Commission Rules on Library References, Order No. 1219, serious concerns arose in the most recent omnibus rate case (Docket No. R97-1) with respect to certain litigation practice involving the use of library references. As noted in that proceeding by Nashua Photo Inc., District Photo Inc., Mystic Color Lab, and Seattle FilmWorks, Inc. ("NDMS"), the practice of labeling documents as library references was not harmful or problematic in and of itself;



rather, it was the possibility of the circumvention of evidentiary requirements in connection with the presentation of testimony that seriously disrupted the proceeding and caused unfairness.

The controversy over library references arose only after the Postal Service attempted to have the Commission, in effect, treat the content of certain library references referenced in testimony as record evidence without establishing an acceptable foundation for admission of the library references into evidence. Postal Service witnesses cited such library references as the exclusive foundation for their testimony, yet no witness “sponsored” or vouched for the underlying library references. The testimony therefore lacked a sufficient basis for admission into evidence, and should have been stricken along with any associated rate or classification proposals. NDMS believed that this use of library references — as exclusive support for testimony which could not stand on its own — defeated the clear intention of the Commission’s established rules. The Commission already had the power to deal with the problem, but apparently felt that the sanction of striking unsupported testimony was too severe. Although recognizing the merits of NDMS’ argument, the Commission nevertheless allowed the Postal Service to file supplemental testimony and thereby amend its initial request. The parties were then allowed additional discovery time to inquire into the new Postal Service evidentiary submissions, but the proceedings were delayed and the additional discovery time was an inadequate remedy.

Thus, although the dispute over striking certain Postal Service testimony in Docket No. R97-1 arose with respect to the Postal Service’s use of library references, the fundamental question was whether the Postal Service should have been allowed to amend its request on the

eve of hearings on the Postal Service case-in-chief when the lack of evidentiary support for some of its proposals had been exposed. The Commission's proposed revisions attempt to address such problems, along with other difficulties that have arisen in connection with the past use of library references, by instituting new procedures making it more difficult to file library references, rather than focusing on the real issue of what should be admitted into evidence.

The Commission proposes to require parties who wish to designate material as a library reference to provide certain information, including not only information relevant to the proposed designation, but also information relative to the party's proposed use of the documentary material in the proceeding and its anticipated evidentiary status. This is to be accomplished by a mandatory formal motions practice. DYMSS believe that this is the wrong approach, and that there should be no such mandatory motions practice with respect to the filing of library references. Since library references are not record evidence, there should be no possible objection by anyone to the filing of virtually anything as a library reference. On the other hand, a requirement of notice as to whether the library reference is to be offered into evidence, similar to that proposed by the Commission in its proposed new rule of practice 31(b)(3), would be useful and should be adopted.

#### Comments

The Commission has proposed amending Rule 31(b) of the Rules of Practice to require parties wishing to submit materials designated as library references to file a motion seeking permission to do so, stating, *inter alia*, the grounds for the proposed designation, an explanation of how the material relates to the participant's case or the issues in the proceeding,

and whether it is anticipated that some or all of it will be introduced into the evidentiary record — and identifying the authors or others materially contributing to its preparation.

DYMSS believe that Rule 31(b) of the Rules of Practice should be modified, but only to require participants filing library references intended to be offered into evidence to designate clearly those portions and to identify their sponsors at the time the library reference is filed. Attachment of such a notice to each library reference would be very helpful to the litigation of a docket. Such a rule would have been most helpful with respect to the Postal Service's initially-filed case in Docket No. R97-1, which at its outset contained over 200 library references. Some unsponsored library references were relied on exclusively in witness testimony, and some of those library references might in turn have been supported by other unsponsored library references. A clear statement of which library references are intended to become evidence, and who sponsors what, could be extremely beneficial to all parties.

DYMSS do not believe that the proposed new library reference procedure should incorporate a mandatory motions practice. DYMSS submit that a better approach would be to require an informational submission by a party filing a library reference, incorporating generally the items mentioned by the Commission in its proposed Rule 31(b)(3). The mere filing of library references should not be discouraged in any way. Having material available as a library reference can be a decided convenience, especially if the matter is unpublished. Such practice is not objectionable. Any objection to the treatment of a library reference would come only if the library reference were sought to be given evidentiary status, as part of the practice that has always been permitted with respect to motions to strike testimony. Then, with the clarification that would follow from adoption of a new rule, it again would fall to the

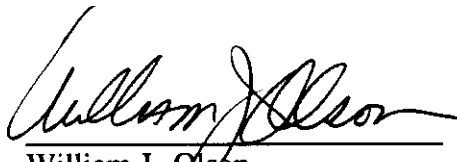
Commission to enforce rigorously its own rules, including demonstrating the willingness to strike testimony and proposals that violate those rules.

The proposed mandatory motions practice procedure would not assist in moving Commission proceedings along. Instead, it is submitted, mandatory motions practice in connection with library references would inject unnecessary paperwork, issues, and argument into the case.

### Conclusion

DYMSS believe that the only change needed to the rules is a modification of the Commission's third paragraph of 31(b)(3), which would read as follows: "[i]f the participant filing the library reference desires ~~anticipates seeking~~ to enter all or part of the material contained therein into the evidentiary record, [a notice shall be filed which identifies any]~~the motion also shall identify~~ portions expected to be entered and the [sponsoring witness(es)] ~~expected sponsor(s).~~" The only additional policy pronouncement which is needed is a statement that the Commission will have no hesitation to enforce its own rules rather and, rather than putting intervenors at a procedural disadvantage or delaying the entire proceeding, in the future it would strike testimony which relies exclusively on unsupported library references.

Respectfully submitted,



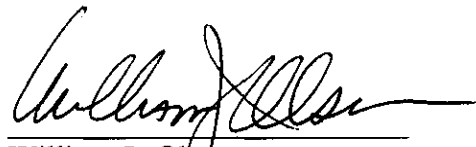
William J. Olson  
John S. Miles

Alan Woll  
John F. Callender, Jr.  
WILLIAM J. OLSON, P.C.  
8180 Greensboro Drive, Suite 1070  
McLean, Virginia 22102-3823  
(703) 356-5070

Counsel for District Photo Inc., York Photo Inc.,  
Mystic Color Lab, Seattle Filmworks, Inc., and  
Skrudland Photo, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies of the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice and Procedure of the Postal Rate Commission.

  
\_\_\_\_\_  
William J. Olson

October 14, 1998